

IN THE

United States Court of Appeals FOR THE NINTH CIRCUIT

NICK ALLEN KLUBNIKIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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No. 14628.

IN THE

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FOR THE NINTH CIRCUIT

NICK ALLEN KLUBNIKIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

Statement of Jurisdiction.

The Indictment in this case was returned and filed on October 13, 1954 in the United States District Court for the Southern District, Central Division of California, charging the appellant with the violation of Section 462, Title 50, App., United States Code [Tr. pp. 3-6].¹

On November 23, 1954, the cause came to trial before the Honorable James M. Carter, United States District Judge, and at the conclusion of the trial the Court found appellant guilty as charged [Tr. pp. 8, 9].

The Judgment and Commitment following the finding of guilty was filed on December 13, 1954 [Tr. pp. 9, 10].

¹"Tr." refers to Transcript of Record.

Notice of Appeal was filed on December 13, 1954 [Tr. p. 11].

Jurisdiction in the United States District Court was conferred by Section 3231, Title 18, United States Code. Jurisdiction in this Court is conferred by Sections 1291 and 1294, Title 28, United States Code.

Statement of the Case.

The Indictment returned on October 13, 1954, charges that the appellant, a male person within the class made subject to Selective Service under the Universal Military Training and Service Act, was registered with Local Board 114; that pursuant to said Act and the regulations promulgated thereunder appellant was classified in Class I-O and was notified of such classification; that on June 7, 1954 appellant was ordered to report for civilian work contributing to the maintenance of the national health, safety and interest; and, on June 21, 1954 appellant did knowingly and wilfully fail and neglect to proceed as ordered to the place of employment designated in said order, to wit: the Los Angeles County Department of Charities [Tr. pp. 3-6].

On October 25, 1954, appellant appeared before the Honorable James M. Carter, United States District Judge. Appellant at that time waived his right to be represented by legal counsel. After being arraigned appellant offered a plea of *nolo contendere* to the charges contained in the Indictment which offer was rejected by the Court. Thereafter, the appellant standing mute and refusing to plead further, it was ordered by the Court that a plea of not guilty be entered in his behalf. A jury waiver was executed by the appellant which was then approved by the

Court and filed. The cause was set for trial for November 23, 1954 [Tr. p. 7].

On November 23, 1954, appellant appeared in *propria personam* before Honorable James M. Carter for the purpose of trial. Appellant again expressly refused the offer of counsel and elected to act in his own defense [Tr. pp. 12-13]. Trial was held without a jury and appellant was found guilty. The Court ordered that a Motion for New Trial be entered on behalf of the appellant and that said Motion and the matter of the sentence of the appellant be heard on December 13, 1954 [Tr. pp. 8-9].

On December 13, 1954, sentence was pronounced and appellant was sentenced to four years imprisonment [Tr. pp. 9-10]. On the same date appellant moved in the District Court that bail should be fixed pending determination of the proposed appeal. This Motion was denied [Tr. pp. 37-42]. Also on the same date appellant filed a Notice of Appeal [Tr. p. 11].

On January 7, 1955, the District Court denied appellant's renewed Motion for Bail Pending Appeal. The Motion was made on this occasion by the appellant through his counsel of record A. L. Wirin and Hugh Manes [Tr. pp. 43-49].

On January 24, 1955, the United States Court of Appeals for the Ninth Circuit denied appellant's Motion for Bail Pending Appeal.

On February 18, 1955, United States Supreme Court Justice William O. Douglas granted appellant's application for bail on appeal.

Statute Involved.

The Indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The Indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides in pertinent part:

“(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment. . . .”

Statement of the Facts.

Nick Allen Klubnikin registered with the Selective Service System on October 14, 1949. He was assigned to Local Board No. 114 located in Long Beach, California [Ex. p. 1].² He was first classified II-A and subsequently was reclassified I-A which classification he

²Exhibit I is a photostatic copy of the contents of the appellant-registrant's Selective Service file. The photostats which constitute Exhibit I are numbered consecutively and these numbers are circled. References in Appellee's Brief refer to the photostat number and not to the page number.

appealed. On August 6, 1952, the Appeal Board classified the registrant I-A-O. He was ordered to report for induction and failed to do so. On July 8, 1953 after trial registrant was acquitted of charges contained in the Indictment alleging the violation of Section 462, Title 50, App., United States Code [Ex. p. 11].

On November 18, 1953 the Local Board recognized registrant's claim that he was conscientiously opposed to participation to combatant and noncombatant training and service in the Armed Forces and classified him I-O [Ex. p. 8].

On November 20, 1953 the Local Board mailed to registrant SSS Form 152 requesting registrant to submit three types of civilian work contributing to the maintenance of the national health, safety, or interest for which he was qualified and offered to perform in lieu of induction into the Armed Forces. The registrant never returned this form [Ex. pp. 11, 11-A].

On December 2, 1953 the Board wrote a letter to registrant advising him of three types of civilian work which were available to him in lieu of induction and requested that he indicate his preference at the bottom of the letter and return the letter to the Board [Ex. p. 74]. The registrant failed to comply [Ex. p. 11-A].

On February 10, 1954 the registrant met with members of the Local Board and a representative of the State Director of Selective Service. At this time the registrant refused the civilian work previously offered him and also declined to suggest any other civilian occupation which might be more appealing to him, stating that he would accept no work [Ex. pp. 78-79].

On April 5, 1954 the registrant was ordered to report on April 13, 1954 for a physical examination. The registrant failed to report [Ex. pp. 11-A, 90].

On April 14, 1954 registrant wrote a letter to the Local Board in which he requested to be classified III-A (dependent deferment). The Board replied to the registrant on April 16, 1954 that after considering the facts contained in his letter his request for reopening or reclassification was denied [Ex. pp. 99-101].

On June 7, 1954 with the approval of the National Director of Selective Service registrant was ordered to report for civilian work. The order recited that he should report to his Local Board on June 21, 1954 where he would be given instructions to proceed to the place of employment [Ex. p. 108].

On June 15, 1954 registrant, in a letter to the Local Board requested the cancellation of the order to report for civilian work and reasserted his claim to a III-A classification [Ex. pp. 117-118]. The Local Board advised the registrant that he should report as ordered [Ex. p. 119].

On June 21, 1954 the registrant reported to the Local Board as ordered and was then and there instructed to report to the Los Angeles County Department of Charities on June 22, 1954 to perform civilian work in lieu of induction [Ex. pp. 120, 122]. The registrant failed to report as instructed [Ex. p. 110].

ARGUMENT.

I.

The Registrant Was Not Entitled to Be Reclassified or to Have His Classification Reopened on April 14, 1954 or June 15, 1954.

A. Reopening of Classification in General.

The Selective Service Regulations imposed the duty upon the registrant to report to the Local Board any fact which might affect his classification within ten days after such fact occurs (Sec. 1625.1(b).)

The regulations provide that under certain circumstances a Local Board *may* reopen and consider anew the classification of the registrant:

“1625.2 When Registrant’s Classification May be Reopened and Considered Anew.—A Local Board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant’s classification, . . .”

It is clear, therefore, that it is left to the *discretion* of the Local Board whether or not to reopen the classification of a registrant upon his presenting facts which might affect his classification. This is demonstrated by the heading of the next section which sets forth the circumstances making reopening mandatory:

“1625.3 When Registrant’s Classification Shall Be Reopened and Considered Anew.”

Whether or not new evidence is of sufficient weight to require the reopening of the case lies within the discretion of the Board.

United States v. Bartelt (7th Cir., 1952), 200 F. 2d 385, 389;

Smith v. United States (4th Cir., 1946), 157 F. 2d 176, 181.

B. The Universal Military Training and Service Act and the Regulations Thereunder Do Not Provide for Extreme Hardship or Dependent Deferments for Registrants Who Are Classified I-O.

Section 456(h) of the Act authorizes the President to prescribe regulations concerning extreme hardship and dependent deferments as follows:

“The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment *from training and service in the Armed Forces or from training in the National Security Training Corps*, (1) of any or all categories of persons in a present status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable . . . ,

* * * * *

“The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment *from training and service in the Armed Forces or training in the National Security Training Corps* of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes.” (Emphasis added.)

Section 456(j) of the Act which provides for the exemption of those who are conscientiously opposed to participation in war makes no provision for any deferment for those who are classified I-O and thus already exempted.

“Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, . . . in lieu of induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform . . . such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate.”

It appears, therefore, that Congress did not intend that those registrants in class I-O should be deferred because of extreme hardship or the privation of dependents. Under the 1948 Act the I-W registrant (conscientious objector performing civilian work) is not compelled to be apart from his dependents as is the serviceman or as was the conscientious objector under the former Act. Nor is the civilian work performed by the I-W registrant likely to result in extreme hardship to his dependents, for while he is performing his duty to his country he is able to earn a satisfactory living.

The regulation governing class III-A deferments provides in part as follows:

“1622.30 Class III-A: Registrant With a Child or Children; and Registrant Deferred by Reason of Extreme Hardship and Privation to Dependents.—
(a) In Class III-A shall be placed any registrant who prior to August 25, 1953, has submitted evi-

dence to the local board which establishes to the satisfaction of the local board that he has a child or children with whom he maintains a bona fide family relationship in their home. Such a registrant shall remain eligible for Class III-A so long as he maintains a bona fide family relationship with such child or children in their home.

“(b) In Class III-A shall be placed any registrant whose induction *into the armed forces* would result in extreme hardship and privation (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support, or (2) to a person under 18 years of age or a person of any age who is physically or mentally handicapped whose support the registrant has assumed in good faith; provided, that a person shall be considered to be a dependent of a registrant under this paragraph only when such person is either a citizen of the United States or lives in the United States, its Territories, or possessions.” (Emphasis added.)

Subsection (b) of Section 1622.30 clearly contemplates that deferments for extreme hardship shall be limited to those who would otherwise be inducted into the armed forces.

Subsection (a) by its terms would apparently apply to *any* registrant. The Government submits that should not be construed so as to place it in conflict with the Act. However, if subsection (a) were so construed, the registrant here was not harmed by its operation and would have no cause to complain.

C. The Local Board Would Not Have Been Justified in Reopening the Registrant's Case Because of the Assertions Contained in His Letters of April 14, 1954 and June 15, 1954 to the Local Board.

Regardless of whether registrants in general are entitled to an extreme hardship or dependent deferment under the Act the Local Board was correct in refusing to reopen the appellant-registrant's case.

On April 5, 1954 the registrant was ordered to report for a physical examination on April 13, 1954 as a preliminary step to his being ordered to report for civilian work. He did not comply. Then, on April 14, 1954 the registrant for the first time requested a deferment upon the grounds that he was married and was an expectant father, and upon the further grounds that he was presently supporting his widowed mother.

Section 1622.30(a) provides for a deferment for a registrant who prior to August 25, 1953 has submitted satisfactory evidence to the Local Board that he has a child or children with whom he maintains a bona fide family relationship in their home. Appellant contends that Section 1622.30(a) is discriminatory in that by specifying a "cutoff" date, some fathers are deferred while others are liable for induction (Brief of Appellant, pp. 15-16). This is certainly the effect of the section. But similar results flow from all legislation and regulation, for the entire process of legislation and regulation is one of drawing the line and designating the demarcation point.

Section 456(h) of the Act authorizes the President, under such rules and regulations as he may prescribe, to provide for the deferment from training and service "any or all categories of persons who have children, or wives

and children with whom they maintain a bona fide family relationship in their homes." Under the provisions of the Act, the regulations could have been drawn so that all registrants no matter how numerous their children would not be entitled to a deferment. The President chose instead to allow deferments to registrants with children on August 25, 1953, but to none others unless the existence of a child and the induction of a registrant would result in extreme hardship. The establishment of this deadline was assuredly within the authority granted the President.

This Court's comments in the case of *Talcott v. Reed* (9th Cir., 1954), 217 F. 2d 360, cited by appellant at page 15 of his brief, were not directed at Section 1622.30 but were directed at General Hershey's Operation Bulletin No. 57. That Bulletin is not pertinent to the issues raised here and this Court's comments would seem to have no application.

If the registrant was not entitled to be reclassified because of his dependents then his only other claim to a III-A classification would have been upon the basis that to perform civilian work of national importance would have caused his dependents extreme hardship.

It must be recalled that the hardship caused the dependents of one who is inducted into the armed forces will always be far greater than that imposed upon a registrant ordered to perform civilian work. In many cases the conscientious objector performing civilian work of national importance can earn a salary equal to that which he previously earned, although he might be required to work longer hours and perhaps work at two different jobs. Furthermore the I-W registrant's dependents are not deprived of his presence while he is serving his country. For this reason even if it were the policy of the Local

Boards to grant deferments for hardship to conscientious objectors, they would be justified in withholding such deferment except in the event of extraordinary circumstances.

Whether or not the Local Board shall reopen a case is left entirely to their discretion by the Act and the regulations. The Board considered the assertions of the registrant and decided not to reopen. It appears that reopening in this instance would have been a futile, time consuming, action, for the registrant would not have been entitled to the classification requested by him under any circumstances. This Court in the case of *Talcott v. Reed, supra*, at page 363 stated as follows:

“As to hardship, we think the showing is not sufficient to require a reversal. A showing of hardship in some degree could be made as to every selectee. Army life removes the young man from regular pursuits. We think in a very extreme case only would a court be justified in reversing a board’s order on this point.”

D. The Registrant Was Not Entitled to an Appeal From the Local Board’s Decision Not to Reopen His Case.

On April 16, 1954, after reviewing the facts set forth in the registrant’s letter requesting to be placed in Class III-A, the Local Board notified the registrant the facts presented by him did not warrant reopening [Ex. p. 101]. The Local Board acted correctly in sending notice of their decision by letter rather than by Form No. 110. (Regulations, Sec. 1625.4.) The registrant had no right to appeal from this decision. (Sec. 1626.2(c); *Skinner v. United States* (9th Cir., 1954), 215 F. 2d 767.) Nor did he have the right to a personal appearance before the Local Board. (Sec. 1624.1, 1624.2.)

Section 460(b)(3) of the Universal Military Training and Service Act provides for the establishment within the Selective Service System of civilian appeal boards and also states:

“. . . The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe.”

Congress, therefore, intended that the President should regulate review procedure and he, in turn, has done so. There is little doubt that had Congress desired they could have provided that the decision of the Local Board would be final. The fact that the regulations do not provide for administrative review from a decision of the Local Board refusing to reopen a case is simply not a constitutional question. What Congress could abolish completely they can regulate as they see fit.

Were the regulations to provide for review from a decision refusing to reopen, the administrative procedure would be nonending. As soon as one appeal was determined another could be begun to the complete frustration of the congressional purpose. The case before this Court presents a very good example of this possibility. The registrant was classified I-O on November 18, 1953. According to his assertion contained in his letter of June 15, 1954, he had been supporting his mother since December 10, 1952. And yet this fact was not brought to the attention of the Local Board until April 14, 1954, at which time the registrant requested reopening in part upon the basis of this “new evidence.” Had the regulations provided for appeal from the Board’s decision not to reopen, and the registrant had done so, it is predictable that after

the Appeal Board had affirmed, the registrant would have presented other "new evidence" to the Local Board thus beginning this dilatory process anew.

Furthermore, it is doubtful that the registrant intended to appeal in the technical sense when he wrote his letters of April 14, 1954 and June 15, 1954. Rather he used the term "appeal" in the sense of the term "request." This must be so in the instance of the April 14, 1954, letter since there was nothing from which to appeal from. He was last classified on November 18, 1953, and the time for appeal had long since expired. On April 14, 1954, the registrant said:

"Although I am still full a Conscientious Religious Objector of the Molokan Faith, there have come about certain events under which *I am appealing* for a 3-A classification. . . .

"Awaiting your decision on my *Appeal* for a 3-A classification . . ." (Emphasis added.)

In his letter of June 15, 1954, the registrant began by stating:

"*I am appealing* to you members of Local Board No 114 in request for a cancellation of the report for civilian work that you have sent to me . . ." (Emphasis added.)

The letter continues with a statement of the background of the registrant's classification and then concludes:

"I believe that I am justified in asking for a reconsideration of this *new evidence* which had not been presented until last April 14, 1953³ and in asking for a 3-A classification."

³Registrant intended to state April 14, 1954 rather than April 14, 1953 [See Tr. pp. 24, 25].

The context in which the terms "appeals" and "appealing" were used by the registrant makes it apparent that he intended no appeal. The letters were so construed by the District Court who heard the case at trial [Tr. pp. 47, 48]. In the case of *Jeffries v. United States* (10th Cir., 1948), the registrant wrote to the local board stating, "I hereby appeal to the local board for reconsideration of my Selective Service classification . . ." There it was held that the language was not intended as an appeal even though the time for appeal from the registrant's classification had not expired.

The regulations provide for a liberal construction of notices of appeal from registrants (Sec. 1626.1). But, there should be no magic words in this field of law any more than in any other. The District Court weighed the evidence and found that the registrant did not intend to appeal. That should conclude the subject.

II.

Section 456(j) of the Universal Military Training and Service Act Is Constitutional.

Appellant contends that Section 456(j) of the Universal Military Training and Service Act of 1948 is unconstitutional for the following reasons:

1. It constitutes a non-federal labor draft in violation of the XIII and XIV Amendments of the Federal Constitution.
2. To require appellant to enter civilian employment not of his own choosing in lieu of military service is an unconstitutional trespass upon appellant's religious liberty.

Under the Selective Training and Service Act of 1940 conscientious objectors were assigned to civilian public

service camps administered by the Federal Government. The Courts reviewing this Act consistently upheld its constitutionality. They held that the Act was not faulty in failing to specify the standards to be used in determining what work was of "national importance."

Atherton v. United States (9th Cir., 1949), 176 F. 2d 835, 841;

Weightman v. United States (1st Cir., 1944), 142 F. 2d 188.

It was held that those conscripted were not being deprived of liberty and property without due process of law by the fact that they worked at a rate of compensation below what they otherwise could have earned.

Atherton v. United States, supra, p. 841;

Hopper v. United States (9th Cir., 1943), 142 F. 2d 181, 186.

These Courts failed to sustain the contention that the Constitution provides only for raising an army and does not permit drafting for other purposes. It was held instead that Congress had the right to call everyone to colors and that no one is exempt except through Congressional allowance.

Roedenko v. United States (10th Cir., 1945), 147 F. 2d 752;

Weightman v. United States, supra;

Atherton v. United States, supra.

Similarly, the contention was rejected that the Act of 1940 violated the right of the individual to freedom of worship and belief. The Courts held that the Constitution grants no immunity from Military Service because of religious convictions or activities. Immunity arises solely

through Congressional grace in pursuance of a traditional American policy of deferment to conscientious objection.

Richter v. United States (9th Cir., 1950), 181 F. 2d 591, 593;

Roodenko v. United States, supra.

The Courts' unanimous reply to contentions that the Act of 1940 was unconstitutional may best be summarized by the following statement from *Roodenko* at page 754:

“If Congress . . . has the power to compel conscientious objectors to serve in the military forces, they cannot be heard to complain that they are relieved from such service on condition that they nevertheless recognize their obligation of citizenship and respond to call and serve their country on non-military work of national importance, under civilian authority. Congress could have required Roodenko to serve in the armed forces. Having no constitutional right of exemption from such service, he certainly can have no constitutional grounds to challenge the validity of an Act which gives him a conditional exemption for a service which he could be compelled to perform.”

Under the Act of 1948 the conscientious objectors retain their personal freedom of movement but are required to perform civilian work contributing to the maintenance of the national health, safety or interest. Their lot is much brighter than the lot of objectors under the former Act and their claims of deprivation of constitutional rights and freedoms are proportionately less grave. The Courts have had opportunity to review the validity of Section 456(j) of the Universal Military Training and Service Act. As late as March 16, 1955, this Court in the case of *Niles v. United States* (9th Cir., 1955), 220 F. 2d 278, passed upon a case similar to the one at hand, and affirmed

the decision of the District Court for the reasons stated in the Opinion of that Court to be found in 122 Fed. Supp. 383. There it was also contended that the Act as applied by the regulations calls for a private non-federal labor draft in violation of the Thirteenth Amendment. The District Court answered this contention by stating at page 384:

“The 13th Amendment abolished slavery and involuntary servitude, except as a punishment for crime, but was never intended to limit the war powers of government or its right to exact by law public service from all to meet the public need.”

The *Niles* Decision, *supra*, also resolves the contention of appellant that the work which he was ordered to perform did not contribute to the maintenance of the “national health, safety, or interest” as required by Section 456(j) of the Act. There, as here, Niles was ordered to report to the Los Angeles Department of Charities. The Court stated at pages 384 and 385:

“A health program conducted by any political subdivision of this nation contributes to the general welfare of the national as a whole. The mere fact that such activities are carried out in the name of a political subdivision of the state or county rather than in the name of the United States itself, does not diminish the importance of the work, or cause it to lose its contributory relationship to the national health.

* * * * *

“In view of the fact that this Court has construed employment in a state charitable institution as work contributing to the maintenance of the national health, safety, or interest, any work done by defendant for such institution within the scope of its operation, is proper and in accordance with the standard set forth by Congress.”

Conclusion.

This appeal involves a registrant to whom the Local Board gave the classification requested by him. Still, he refused to fulfill the obligation required of him by the Universal Military Training and Service Act.

The Judgment of Conviction should be affirmed.

Respectfully submitted,

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